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HAROLD B. WILLEY, C

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1955

NO. 713 MISC

WESLEY ROBERT WELLS,

Petitioner,

vs.

M. F. KING, Superintendent of the California Medical Facility, State of California

Respondent.

No. 713 Misc.

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF CALIFORNIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, WESLEY ROBERT WELLS, prays that a writ of certiorari issue to review the order and judgment of the Supreme Court of the State of California, made and entered on January 25, 1956, denying his petition for a writ of habeas corpus, one Justice dissenting.

Opinions Below

No opinion was rendered by the Supreme Court of California. The Honorable Jesse W. Carter, a Justice of the Supreme Court, dissented from the order and judgment denying the petition for a writ of habeas corpus, without written opinion.[1] Prior petitions for

[1] The order and judgment recited: "CARTER, J., is of the opinion that the respondent should be ordered to show cause why the relief prayedfor should not be granted." (App.A).

writs of habeas corpus filed in the Superior Court for the County of Los Angeles, State of California and the District Court of Appeal of the State of California, Second Appellate District, were also denied without opinions (R.4-5).[2] The opinion rendered by the District Court of Appeal of the State of California, Third Appellate District, affirming petitioner's conviction under an information charging a violation of the provisions of Section 4502 of the Penal Code of California is reported in 68 C.A.2d 476, 156 P.2d 979 (App.B).

Jurisdiction

The order and judgment of the Supreme Court of California was made and entered on January 25, 1950 (App.A). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

Questions Presented

1. Whether the court below wrongfully dismissed the petition for a writ of habeas corpus without a hearing when the undenied allegations in the petition charged that petitioner had been denied the equal protection of the laws and deprived of his liberty without due process of law in violation of the applicable provisions of the Fourteenth Amendment to the Constitution in that petitioner, while confined, was arbitrarily denied the assistance of counsel of his own choice in the preparation and presentation of his appeal from a judgment of conviction; denied access to the courts to request the appointment of counsel; denied the opportunity with the aid of lay assistance, or by himself, to properly prepare his record on appeal and assignments of errors, briefs and arguments, either written or oral, in the appellate court, and all of his necessary papers and documents suppressed by officials of the state as

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[2] The reference is to the record prepared by the Clerk of the Supreme Court of California and certified to this Court in connection with this petition for a writ of certiorari.

punishment for attempting to prosecute his appeal and petitioner placed in a "dungeon" to make any communication with the courts impossible so that, in totality, petitioner was discriminatorily and arbitrarily denied by the state his constitutional and statutory right to appeal and the privileges of appeal subsumed thereunder.

2. Whether the court below wrongfully dismissed the petition for a writ of habeas corpus without a hearing when the undenied allegations in the petition charged that petitioner had been denied the equal protection of the laws and deprived of his liberty without due process of law in violation of the applicable provisions of the Fourteenth Amendment to the Constitution in that petitioner, while confined to a penal institution maintained by the state and its officers, was subjected to special punishments, pains, disabilities and penalties solely because of his race; that because of his protests against such racial discrimination, officials of the state encouraged, aided, abetted and incited physical attacks and assaults upon petitioner by prison guards and selected inmates of the prison; and that having placed petitioner in fear and jeopardy for his life, the said officials by their conduct encouraged and approved an armed assault upon petitioner so that he was compelled to seize a weapon as the only available protection for the safety of his life, thus enabling the officials of the state to prosecute petitioner for an offense which carried a life sentence, solely in order to punish petitioner for his aforesaid protests against the racial discrimination practised against himself and others similarly situated in the said penal institution.

3. Whether the court below wrongfully dismissed the petition for a writ of habeas corpus without a hearing when the undenied allegations in the petition charged that petitioner had been denied the equal protection of the laws and deprived of his liberty without due process of law in violation of the applicable provisions of the

Fourteenth Amendment to the Constitution in that petitioner was denied in the criminal proceedings prior to trial, and particularly at the required preliminary hearing, the assistance of counsel of his own choice and the opportunity to summon witnesses in his own behalf.

Constitutional Provision Involved

The following portion of the provisions of the Fourteenth Amendment to the Constitution of the United States is involved herein:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioner filed an application for a writ of habeas corpus in the Supreme Court of California (R.1-24) alleging facts which established that petitioner was illegally imprisoned under a judgment of conviction in violation of rights guaranteed him by the federal Constitution. Without requiring the state to answer and without giving petitioner an opportunity to prove his allegations, the application was dismissed.3/

One of the claims in the petition for the writ of habeas corpus in the court below (R.8-17) was that the state of California through its officials had in a discriminatory and unlawful manner denied petitioner his constitutional and statutory privileges of

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3/ In this posture of the record, the California courts necessarily held that petitioner's averments, even if proven in their entirety, would not entitle him to habeas corpus, even if the petition showed a deprivation of federally protected rights. See, Pennsylvania ex rel. Herman v. Claudy, 350 U.S.116; Chessman v. Teets, 350 U.S.3; Hawk v. Olson, 326 U.S.271; Smith v. O'Grady, 312 U.S.329. See also, Thomas v. Teets, 205 F.2d 236, 240 (C.A.9,1953), and Cal.Penal Code, Sections 1473,1476, 1483.

appeal from a judgment of conviction rendered against him in the state court.4/ Contending that officials of the state had illegally thwarted and frustrated petitioner's right to final determination of his guilt or innocence under the criminal charge laid against him, petitioner alleged that he had been deprived of his liberty without due process of law and denied the equal protection of the laws in violation of the applicable provisions of the Fourteenth Amendment (R.6, 9,17,18, 23-4).

In support of this claim, petitioner alleged the following facts which on the record before this Court must be accepted as true: On September 26, 1944, petitioner stood convicted after a trial before a jury under an information charging violation of Section 4502 of the California Penal Code (R.9). That section makes it a felony, punishable by imprisonment for a term not less than five years, for any prisoner in a state prison to possess a deadly weapon. It was alleged in the petition, and not denied, that "petitioner had several grounds of appeal, including his right of self defense, each of which would have required the reversal of his conviction" (R.17).5/

4/ In California an appeal is a matter of both statutory and constitutional right. "The right of appeal is conferred by the constitution, and statutes and rules of procedure for its exercise are to be liberally construed." Estate of Nelson, 128 Cal.242,245, 60 Pac.772. See Cal.Const., Article 6, Sections 4a and 4b; Cal. Code Civ. Procedure, Section 936; Cal.Penal Code, Section 1237; Rules on Appeal, Part V - Appeals in Criminal Cases, Rule 30 et seq. See also, Ricketson v. Compton, 23 Cal.636, 649; Ex parte Hoke, 48 Cal.3,6; In re Byrnes, 26 C.2d 824, 161 P.2d 376; People v. Slobodian, 30 C.2d 362, 181 P.2d 868; People v. Becker, 108 C.A.2d 764,768, 239 P.2d 98; Guest v. Guest, 93 C.A.2d 339, 345, 127 P.2d 934; People v. Rascon, 128 C.A.2d 118, 274 P.2d 899.

5/ We discuss some of these errors in detail in the subsequent discussion which follows, although it should be noted initially that in California "an appeal is a matter of right, and that right cannot be defeated because the appeal may be groundless." Ricketson v. Compton, 23 Cal.636,649.

As soon as he was convicted, petitioner was returned to prison and there he was placed in solitary confinement by the warden of the prison, and petitioner was thereafter denied contact with anyone except an inmate attendant and a guard (R.9). Petitioner had been represented for a time at the trial by counsel, but during the course of the trial, petitioner obtained permission from the court to conduct his own defense (R.9) At the conclusion of the trial, counsel informed petitioner that he would visit him at prison to discuss a motion for a new trial and an appeal, but counsel never appeared (R.10).

Petitioner, believing himself abandoned by his counsel, informed the warden that he desired to communicate with another attorney. "The warden informed petitioner that, inasmuch as he was already represented by an attorney of record, he would not be permitted to communicate with another attorney" (R.10). Petitioner told the warden that his attorney apparently did not intend to come to the prison to see him, nor to represent him any longer. Petitioner repeatedly requested the warden to allow petitioner to seek the services of an attorney, but "the warden at all times refused petitioner's request to do so" (R.10).

Petitioner had only a fourth grade education and was ignorant of the proper legal forms and procedures by which to pursue his appeal (R.10). Denied the opportunity to obtain counsel to prosecute his appeal, petitioner asked the warden for permission to communicate with another inmate of the prison, one Marvich. Petitioner believed that Marvich, though not a lawyer, had enough knowledge of law and procedure to aid petitioner in filing his appeal in propria persona. Permission was refused (R.10-11).

Petitioner thereafter communicated with Marvich without the knowledge of the warden and other prison officials. He tapped out a message on the wall of his cell to other inmates of the prison to relay his plea for help (R.11). He smuggled papers and documents

in his case out of his place of confinement in solitary to the said Marvich (R.11).

Marvich prepared and smuggled back to petitioner a document entitled "Notice of Appeal, Grounds of Appeal, and Demand for Stenographic Transcript and Clerk's Transcript" (R.11). A copy of this document was annexed to the petition for a writ of habeas corpus as Exhibit "A". Petitioner filed this document with the Superior Court (R.11).

Petitioner and Marvich were ignorant of the legal requirements of appellate procedure (R.15). The aforesaid document filed in the trial court, signed by petitioner in propria persona, advised the court broadly that petitioner was appealing from the judgment of conviction, that the "general founds of his appeal" included the unconstitutionality of the statute, errors in the exclusion of evidence, errors in the "decisions of questions of law," errors of law occurring at the trial, misconduct of the court and prosecutor, errors "in refusing to give certain instructions" and misdirection of "the jury in matters of law," verdict contrary to evidence and law and indefiniteness and unconstitutionality of the sentence and judgment.6/ Petitioner also included in the same

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6/ The petitioner was sentenced to imprisonment in a state prison, there to be confined in accordance with law. The minimum term of imprisonment for violation of Section 4502 of the California Penal Code is five years; no maximum is provided. California treats such sentence as an indeterminate one and one fixed for life unless the Adult Authority fixes a shorter term. People v. Wells, 33 C.2d 330, 202 P.2d 53; Cal. Penal Code, Section 3077. The Adult Authority never acted. Petitioner, therefore, as a result of the conviction herein allegedly became a "lifer," and while in this status subsequently was alleged to have assaulted a prison guard. An assault by a prisoner undergoing a life sentence is punishable by death. Cal. Penal Code, Section 4500. Petitioner was convicted of this offense and sentenced to death. He prosecuted various legal proceedings thereafter but his conviction was finally affirmed (R.3-4). Upon application to the Governor of the State of California, the death sentence was commutted to life imprisonment without parole (R.4). Petitioner's permanent incarceration, therefore, stems from the original conviction under Section 4502 of the California Penal Code, a conviction which he contended in his petition for a writ of habeas corpus had been obtained in denial by the state of rights guaranteed him by the federal Constitution.

document a request that all the proceedings be fully set forth in the record on appeal "in order to properly present his appeal" as shown in the aforesaid Exhibit "A" annexed to the petition for habeas corpus.

The trial judge ruled, without petitioner or any counsel present, that only the "normal record" would be prepared, that under the provisions of the Rules on Appeal, petitioner "has given no point or points whatever 'on which he intends to rely which make it proper to include' the material which he desires to have included; likewise he has not included in his request for additional record any instructions given or refused" (App.C.2/ As a result, the record placed before the appellate court was incomplete, particularly failing to include the instructions given by the trial court and the instructions requested but refused (R.16).

Petitioner then wrote a letter to the appellate court telling of his difficulties and asking the court to appoint an attorney for him. The warden's office refused to transmit the letter (R.12).

While petitioner remained in solitary confinement, the aforesaid Marvich prepared and smuggled to him an "Opening Brief", which, although incomplete and inadequate, petitioner was compelled to file (R.12). The brief informed the appellate court of petitioner's plight, that he had been held in solitary confinement since the commission of the alleged offense; that the brief had been written by a prison inmate with a limited knowledge of the law; that a full

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2/ The petition for a writ of habeas corpus alleged that petitioner had been denied the assistance of counsel to prosecute the appeal and that petitioner and Marvich were laymen, ignorant of the requirements in appellate procedure; that for these reasons the document may have lacked specificity. The ruling of the trial judge nevertheless appears to have been unduly harsh considering the grounds set forth in the document by a defendant in propria persona. See People v. Mascon, 128 C.A.2d 118, 274 P.2d 899; Rules on Appeal in Criminal Cases, Rule 33. That the assistance of counsel would have produced a complete record on appeal can hardly be doubted.

and complete transcript had been requested from the trial court, but was not furnished; that petitioner was forced to appeal on an incomplete record without the instructions to the jury or the trial court's order ruling out the defense of self-defense; that because petitioner was confined in solitary confinement petitioner was not able to request a complete transcript within the statutory period allowed by law (R.12-13).

The prosecutor filed an answering brief which was mailed to petitioner (R.13). The answering brief inaccurately stated the facts and law involved in the case (R.13). Petitioner smuggled the prosecutor's brief to Marvich who began the preparation of a reply brief (R.13).

The warden at this point discovered that Marvich was helping petitioner prepare his appeal. He confiscated "all files, records, books and papers pertaining to the case which were in Marvich's possession, including the Reply Brief of the Attorney General and Appellant's Reply Brief, which were in the preparatory state" (R.13). To make certain that there would be no further communication with Marvich, the warden placed petitioner in the "dungeon" (R.13). Petitioner had now been denied not only the assistance of counsel and his lay helper, but it was impossible for petitioner to represent himself (R.13).

The appeal was set for argument on February 5, 1945 (R.13). On February 3, 1945, petitioner wrote to the appellate court. A copy of his letter was attached to the petition for the writ of habeas corpus and marked Exhibit "B". He stated, among other things, that the officials of the prison had exerted every effort "to prevent me from presenting my case" to the court; that he had been confined under close custody since August 15, 1944, and that his case had presented through the efforts of an inmate of the prison "who has a meager knowledge of the law"; that "on the 1st of Feb. this year all legal papers pertaining to my case, my closing brief

included, has been confiscated by the officials of this prison." Petitioner requested a continuance of two weeks and also requested that "the court order the Warden to release all legal papers pertaining to my case." Petitioner added that he was very desirous of filing a closing brief.

The letter apparently was held up by the prison officials and did not arrive until after the case had been called for argument (R.14).8/ On February 6, 1945, the clerk of the appellate court replied in a letter annexed to the petition for habeas corpus as Exhibit "C", stating that he had consulted the Presiding Justice "about the contents of your letter." The clerk wrote: "Regarding the last paragraph of your letter [this was the request for an order to the warden to release all legal papers pertaining to petitioner's case], manifestly, this department has no control over the actions of the prison officials in the conduct of their duties."

The aforesaid letter also contained a statement that petitioner would be permitted to file a closing brief within a period of 9 days. This relief was empty because the warden continued in his refusal to release the prosecutor's answering brief or any of the other documents which he had confiscated (R.14-15).

Thus, denied the assistance of counsel of his own choice; denied the opportunity to request the court to appoint counsel; unable, therefore, to prepare a complete record on appeal and therefore deprived of the opportunity to urge serious errors committed at the trial; or to urge errors which counsel could have advanced; with an incomplete record, an inadequate opening brief, without the filing of a reply brief, and without any appearance or presentation

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8/ At the argument there was no appearance for petitioner. There was an appearance by the prosecutor, but whether the prosecutor made any argument or statement on the merits could not be ascertained (R.13-14). The Court then declared the matter submitted.

in the appellate court by petitioner either in person or by counsel -- all the result of the arbitrary and unlawful action of officials of the state -- petitioner's conviction was affirmed (R.15).9/

Separately, and in addition, the petition for a writ of habeas corpus alleged (R.18-24) that petitioner is a Negro, now 46 years of age who has virtually spent all his adult life in the prisons of California, with no more than four years of formal education (R.18). During his long incarceration, petitioner was constantly subjected to discrimination and segregation because of his race (R.18-19). It is not denied that as a part of such discrimination, petitioner was subjected to indignities, brutal and special punishments; that he was denied opportunities which other prisoners enjoyed; and denied the opportunity particularly to rehabilitate himself to which others were accorded (R.19). Petitioner's resentment against these discriminations was converted by the prison authorities into the designation of petitioner as a "dangerous, unruly and incorrigible prisoner" (R.19).

It is not denied that because of their hostility, the prison officials "incited guards and fellow prisoners against petitioner and refused to give petitioner any protection against attacks by

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9/ It is settled, as we demonstrate later in this petition, that whether an accused is guilty or innocent of the offense charged under the circumstances herein, or whether he was materially injured in the conceded deprivation by the state of fundamental rights guaranteed to him by the federal Constitution, or the extent of such injuries, are immaterial considerations if fundamental federal rights are infringed. However, the petition for writ of habeas corpus did allege that there were several grounds of appeal which would have required the reversal of his conviction (R.17). One example may be noted here. At the trial, petitioner contended in effect that he was confronted with an emergency which justified his seizure of the prohibited weapon in order to protect himself. Some evidence was admitted by the trial court on this issue, but in the instructions to the jury and in refusals to instruct (App.B), the issue was ruled out of the case. Because the trial court refused to include the instructions and requested instructions in the record on appeal as aforesaid, the appellate court erroneously assumed that the issue had been properly submitted to the jury, and that the "issue was decided against him" (App.B). This erroneous view could hardly have obtained if petitioner had been permitted the effective assistance of counsel on appeal.

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guards or fellow prisoners" (R.19). This was attested to by the sworn affidavit of one of the guards, attached to the petition for a writ of habeas corpus and marked Exhibit "D". Several months before his conviction herein, petitioner had been stabbed nine times by a fellow inmate while a guard looked on without offering petitioner any aid (R.20). It was not denied that petitioner's mistreatment was the result of the policy, plan and design of the officials of the state, and that the authorities approved and encouraged the attacks upon petitioner (R.20).

It was also not denied that the prosecution of petitioner for the offense of possessing a deadly weapon was intended by the prison officials to punish him for his protests against racial discrimination in the state prisons (R.23). It was admitted that petitioner had picked up the weapon,"reasonably believing that his life was in danger" from the attack of a fellow prisoner, a "con boss", who was himself armed with a deadly weapon (R.21), and that the aggressor was charged with no crime nor disciplined, and indeed rewarded by affording him additional privileges (R.21). It was also conceded that petitioner reasonably believed that all of this occurred with the knowledge and approval of the prison officials, and that petitioner could not expect any protection from prison guards against the attack made upon him (R.21).10/

10/ The trial court refused to admit any "remote" evidence (App.E), and, as stated aforesaid, after admitting some evidence concerning the immediate occurrence, instructed the jury that the law "imputes that the act done knowingly was done with criminal intent" and that "the defendant cannot claim self-defense, nor that he was justified in the possession, custody, or control thereof..."(App.D). Because petitioner's appeal was frustrated and aborted, these various errors were never presented nor properly considered by the appellate court. Reversal was plainly probable. Indeed, any holding by a state court that a person is guilty of "possession" of a deadly weapon when the attack was wilfully and intentionally incited by prison authorities and the emergency makes it impossible to save one's life except by defense with a weapon would itself raise a question of deprivation of liberty without due process of law under the federal Constitution.

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Moreover, the petition for a writ of habeas corpus alleged, as a distinct and additional claim, that petitioner had been deprived of the assistance of counsel and to summon witnesses in his own behalf in the initial stages of the criminal proceedings here involved (R.6-8). It was not denied that petitioner appeared at the preliminary hearing, where evidence was adduced against him, without counsel. It was conceded that he requested a continuance for the purpose of obtaining witnesses; that he asked leave to consult an attorney; that he informed the court that he had not theretofore been in a position to obtain an attorney; that all of his requests were summarily denied, and that the proceedings were conducted without affording petitioner opportunity to obtain counsel of his own choosing or witnesses in his own behalf (R.6-8). The court records stated: "Wells requested a continuance. Wells had no attorney. Continuance denied" (R.8).11/

Manner in which the Federal Questions were Raised

In California, the lower courts (Superior); the intermediate appellate courts (District Courts of Appeal), and the Supreme Court have concurrent jurisdiction to issue writs of habeas corpus.

11/ In California, offenses may be prosecuted by indictment or information. If prosecution is by indictment, preliminary examination by a magistrate is permissive; if prosecution is by information, as was the case here, preliminary examination is mandatory. The magistrate must allow the accused "a reasonable time to send for counsel." Cal.Const. Art.1, Section 8; Cal. Penal Code, Sections 858,859. Failure to comply with these provisions is not a mere irregularity. California considers deprivation of counsel under such circumstances as "a plain and palpable violation of a fundamental right of the defendant which rendered the commitment illegal." People v. Hapthaly, 105 Cal.641, 644, 39 Pac.29; People v. Williams, 124 C.A.2d 32, 268 P.2d 156. California also considers a judgment of conviction rendered upon such illegal commitment as void and in excess of jurisdiction because rendered in violation of fundamental state and federal constitutional rights, and habeas corpus lies to obtain relief. In re James, 38 C.2d 302, 240, P.2d 596; In re Masching, 41 C.2d 530, 261 P.2d 251; People v. Aviles, 86 C.A.2d 289,194 P.2d 829; Ex parte Baker, 88 Cal.84,25 Pac.966; People v. Salas, 80 Cal.App.316, 250 Pac.526, In re Williams, 52 Cal. App.566,571,199 Pac.347.

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Const. Cal., Art.6, Section 4; Section 4b; and Section 5. A procedural rule (Rules on Appeal, Rule 56(a)) requires that application be first made to the Superior Court, then to the District Court of Appeal, and then to the Supreme Court. In criminal cases an order denying a writ of habeas corpus is nonappealable. If the writ is denied, the remedy is a new application to the next highest court. Witkin, B.E., California Procedure (1954) vol.3, p.2161.

Petitions for writs of habeas corpus here were presented to the Superior Court (R.4-5), the District Court of Appeal (R.5) and the Supreme Court. The same federal questions were presented in all courts (R.4-5), except that the petition for a writ of habeas corpus in the Supreme Court included additionally the claim of deprivation of federal rights at the preliminary hearing (R.5). All of the aforesaid petitions for writs of heabeas corpus were denied without requiring the state to answer and without affording petitioner the opportunity to prove the allegations contained in the petitions (R.4-5).

In California, the remedy of heabeas corpus lies to determine the rights of one imprisoned under a judgment which has not become final because public officers prevented the presentation of an appeal. In re Byrnes, 26 C.2d 824, 161 P.2d 376. Habeas corpus lies in California when state officials, by regulation or otherwise, purpose to abridge a prisoner's right to access to the courts. In re Robinson, 112 C.A.2d 626, 246 P.2d 982. An accused is entitled in California to consult with counsel of his own choice even though confined in a state institution, and such deprivation of rights guaranteed by the federal and state constitutions is remedied by habeas corpus. In re Rider, 30 Cal.App.797,195 Pac.905. Generally, the rule in California is that "with the expansion of the function of habeas corpus in this state, an application for that writ has become the proper remedy to attack collaterally a judgment

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of conviction which has been obtained in violation of fundamental constitutional rights." People v. Adamson, 34 C.2d 320,327, 210 P.2d 13; In re James, 38 C.2d 302, 240 P.2d 596; In re Maschino, 41 C.2d 530, 261 P.2d 251. The coercive and corrupt action of state officers, or the contrivance and instigation of baseless prosecutions or persecutions is reviewable by habeas corpus. In re Mooney, 10 C.2d 1, 14, 73 P.2d 554. For all of the aforesaid and related relief, habeas corpus in California appears to be not only the proper remedy, but the sole remedy which may be pursued. People v. Cravens, 115 C.A.2d 201, 204, 251 P.2d 717; People v. Sorenson, 111 C.A.2d 404, 244 P.2d 734; In re Williams, 52 Cal.App.566, 571, 199 Pac.347.

Argument

The Ruling of The Court Below, Dismissing The Petition For A Writ Of Habeas Corpus, Refusing The Issuance of The Writ And Denying Petitioner The Opportunity At A Hearing To Prove The Allegations Contained In His Petition, Is Not In Accord With Applicable Decisions Of This Court

I

The Admitted Discriminatory Denial And Infringement By The State Of Petitioner's Rights And Privileges Of Appeal From A Judgment of Conviction Deprived Petitioner Of His Liberty Without Due Process of Law And Denied Him The Equal Protection

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Of The Laws Contrary To The
Applicable Provisions Of The
Fourteenth Amendment.

If the duty rests on state courts as well as this Court "to safeguard the federal constitutional rights of petitioner" (Hawk v. Olson, 326 U.S.271,273), no valid reason appears on this record why the court below refused petitioner a hearing in the light of the allegations contained in his petition for a writ of habeas corpus.12/ Summary dismissal in the face of petitioner's serious allegations appears to be totally inconsistent with decisions of this Court. Since the petition for habeas corpus was denied without requiring the respondent to answer and without a hearing, this Court ordinarily assumes that the petitioner's allegations are true. House v. Mayo, 324 U.S.42, 45; Williams v. Kaiser, 323 U.S.471; Tomkins v. Missouri, 323 U.S.485,487; Smith v. O'Grady, 312 U.S.329,330.

It is now settled by devisions of this Court that a discriminatory denial by officials of a state of the effective right of appeal is a violation of the equal protection dause of the Fourteenth Amendment. Dowd v. Cook 340 U.S.206; Cochran v. Kansas, 316 U.S.255. When the state provides appellate proceedings in order to finally determine the guilt or innocence of an accused, arbitrary discrimination by the state in the use of the processes of law thus afforded all persons run counter to the prohibitions of the Constitution. Dowd v. Cook, supra; Cochran v. Kansas, supra; Ex parte Hull, 312 U.S.546; Cole v. Arkansas, 333 U.S.196,201; Johnson v. Zerbst, 304 U.S.458,467.

12/ "Since the application alleged a violation of due process which was denors the record of the state criminal proceeding, the supreme court was required to issue the writ. Cal.Penal Code, Section 1476, Section 1483. Here again Thomas was denied due process -- that of the state. The California Supreme Court did not issue the writ. Without opinion it merely entered a bald order that Thomas' application was denied." Thomas v. Teets, 205 F.2d 236, 240 (C.A.9,1953) cert. den.346 U.S. 910.

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If the right to review and corrective judicial process be granted, it is plain that the right must be made available equally to all persons for the purposes for which it is granted. In California, the accused has the right in criminal prosecutions "in any court whatever" to "appear and defend in person and with counsel." Cal. Const., Art. I, Section 13. The statutes of the state and the Rules on Appeal implement the constitutional provision. Cal. Penal Code, Sections 1239, 1254; Rules on Appeal, Rule 22(3): "Each party and intervener who appeared separately in the court below may be heard by his own counsel." Yet it is admitted that petitioner here was denied his right to obtain the assistance of counsel of his own choice by officials of the state. The vice of this discriminatory denial of counsel permeated the entire post conviction proceedings.

Moreover, in California any party to an appeal is a criminal proceeding may request the appellate court for appointment of counsel to represent him on appeal. Cal. Penal Code, Section 1241; 30 Cal. State Bar J.303 (1955). The issue involved here is not whether the court was required to appoint counsel on appeal, but whether officials of the state could in any manner bar petitioner's access to the courts of the state and deny him the right to request the appointment of counsel, when such privileges were afforded all other persons in the state. "The question of whether or not the prisoner is entitled to the relief sought, or even whether he is entitled to seek it, are questions which cannot be decided by any prison official or by the Adult Authority, but can and must be decided by the court alone." In re Robinson, 112 C.A.2d 626,629, 246 P.2d 982.

Again, in California, "The right of every man to his day in court is not limited to the trial court but embraces as well his day in the appropriate reviewing court." People v. Becker, 108 C.A.2d 764,768, 239 P.2d 898. In California this "day in court" for "every man" includes, in a review on appeal, an informed examination

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by the appellate court of the record to discover whether there was error prejudicial to an accused's substantial rights. This examination cannot be had without a proper record and proper assignments of error, proper briefs presented to the court, and oral arguments by the accused or his counsel. These privileges of appeal are afforded to all persons in both criminal and civil cases in California (See Rules on Appeal), but petitioner was arbitrarily denied all of these privileges by officials of the state.

Since the substance and not the shadow determines whether a state has arbitrarily denied to one person the privileges it affords to all other persons, it appears clear from the allegations in the petition here, which were admitted, that petitioner was discriminatorily denied the right to review his conviction by the state. In a variety of situations, violation of this essential right has been condemned, and redressed, by the courts. Dowd v. Cook, 340 U.S. 206; Price v. Johnston, 334 U.S.266,280; De Meerleer v. Michigan, 329 U.S.663; Smith v. O'Grady, 312 U.S.329, 334; Cochran v. Kansas, 316 U.S.255; Johnson v. Zerbst, 304 U.S.458,467; Ex parte Hull, 312 U.S.546; Hoykin v. Huff, 121 F.2d 865 (C.A.D.C.,1941); Stidham v. Swope, 82 F.Supp.931, 932 (D.C.Calif.,1949). See, Orfield, Criminal Procedure From Arrest to Appeal (1947), p.426.

Moreover, accepting the allegations as true, petitioner was denied not only the equal protection of the laws, but he was deprived of his liberty without due process of law. It has been uniformly held by this Court that a state may not deprive an accused of the effective assistance of counsel of his own choice in the light of the prohibitions of the Fourteenth Amendment. Powell v. Alabama, 287 U.S.45; Hawk v. Olson, 326 U.S.271,276. When the question is not one as to the right of appointment of counsel, but simply the right to be represented by counsel of one's own choosing, it is settled that such right cannot be infringed by a state without doing violence to the provisions of the federal Constitution. Chandler v.

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Fertig, 348 U.S.3,9; House v. Mayo, 324 U.S.42, 46; Melanson v. O'Brien, 191 F.2d 963, 966 (C.A.1, 1951). And where the state, in compliance with the due process requirements of the fundamental law, purports to supply an accused with corrective judicial process (Cf. White v. Ragen, 324 U.S.760), it is without power at the same time to withhold from an accused the effective assistance of counsel when the accused invokes such corrective process. Smith v. O'Grady 312 U.S. 329, 334; Williams v. Kaiser, 323 U.S.471,477; Johnson v. Zerbst, 304 U.S.458,467.

In California, when a person is called upon to defend himself against a charge of crime he is presumed to be innocent until his guilt is proven. Cal. Penal Code, Section 1096. California purports to provide a procedure for correcting errors upon a trial by appeal, and this procedure is not conditioned upon a preliminary showing of probable error. Risketson v. Compton, 23 Cal.636,649. Obviously, the reviewing court cannot see whether there is error until the appeal is perfected. The review by appeal naturally contemplates an examination of the record to discover whether there was error prejudicial to the accused's substantial rights. This examination, however, cannot be had until a proper record and proper assignments of error, proper briefs and argument are presented to the reviewing court. If an accused is denied counsel and these rights are as a consequence lost, he is effectively deprived by the state of the right to review contemplated by both the state and federal Constitutions without due process of law.

The deprivation of the assistance of counsel, and its consequences, were revealed in the petition for habeas corpus here in perhaps one of its most virulent forms. Here was a person with hardly any formal education, illiterate so far as the law is concerned, confined in jail with virtually no contact with any person. He had been convicted of an offense of which he believed himself innocent; he believed that substantial errors had occurred at his

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trial; that he was deprived of the opportunity to show by proof that he did not commit the offense and that in fact the circumstances which led to his prosecution were contrived and instigated by officials of the state. He desired to appeal from the judgment of conviction, and this was his statutory and constitutional right in California. He believed that trial counsel had abandoned him. Repeatedly he requested the warden to permit him to obtain counsel to help him prosecute his appeal. He was refused. He asked for permission to apply to the courts for appointment of counsel in his behalf. He was again refused. He asked for the help of a fellow inmate. Refusal again followed. Surreptitiously, and under the most difficult circumstances, he tried himself with the aid of a layman to initiate and prosecute his appeal. Partly through his own incapacities, and partly through the unusual strict interpretation of the law by the trial court, petitioner failed to perfect his record on appeal. Thus serious errors which could be pressed were never pressed, and the appellate court had before it an incomplete record for review. Before he could complete the filing of briefs, all of his papers were confiscated by the prison authorities. Petitioner called upon the court for relief and it was refused. His last hope vanished as the warden proceeded to place him in the "dungeon." The appellate court "affirmed" his conviction -- without an appropriate record, without appropriate briefs, without argument, and without counsel. Clearly, the action of the state here failed to conform to the fundamental conceptions of justice which lie at the base of our civil and political institutions. Deprived of the assistance of counsel, petitioner was afforded only a pretense of corrective review procedure, not its substance. Cf. Moore v. Dempsey, 261 U.S.86.

California holds that where fundamental federal rights are flagrantly denied, as was the case here, an accused has simply been deprived of his liberty without legal process for which redress

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must be afforded. It holds that under such circumstances it is "difficult and unnecessary" to determine "the precise degree of prejudice" sustained as a result of the deprivation of such fundamental rights. People v. Lanigan, 22 C.2d 569, 140 P.2d 34; People v. Aviles, 36 C.A.2d 289,296, 194 P.2d 829; People v. Gilliland, 39 C.A.2d 250, 264, 140 P.2d 708; People v. Gaibel, 93 C.A.2d 147, 179, 208 P.2d 743. No other rule could possibly be sustained because the constitutional interdiction is against state action, and officials of the state cannot support their violation of principles of the fundamental law by arguments based on the lack of prejudice or injury to persons who have suffered because of such violations. This, it is submitted, is the underlying rationale in many cases for the rule that "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S.11, 14.

The aforesaid principle has been applied in many cases. In Glasser v. United States, 315 U.S.60,76, it was stated: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." In Hawk v. Olson, 326 U.S.271,278, this Court again stated: "Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect." In Williams v. Kaiser, 323 U.S.471,475, it was stated: "If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused ... He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment." See also, Johnson v. Zerbst, 304 U.S.458,467; Smith v. O'Grady, 312 U.S. 329,334.13/ This principle has been uniformly followed. United

13/ "Time out of mind this Court has reversed convictions for the most heinous offenses, even though no doubt about the guilt of the defendants was entertained. It reversed because the mode by which guilt was established disregarded those standards of procedure which are so precious and so important for our society." Justice Frankfurter in Sacher v. United States, 343 U.S.1,28.

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States v. Venuto, 182 F.2d 519, 522 (C.A.3, 1950); Conlon v. United States, 191 F.2d 749, 759 (C.A.D.C., 1951), cert.den. 342 U.S.976; Nelanson v. O'Brien, 191 F.2d 963, 966 (C.A.1, 1951); "It will not do to say that petitioner was not prejudiced by the lack of counsel because it may appear from a reading of the trial transcript that the evidence of his guilt was overwhelming. For all we may know, this might be attributable to the very lack of counsel, and the consequent inadequate presentation of the defense."

Moreover, the petition for habeas corpus here did allege prejudice (R.17), and this was not denied. How much injury was done petitioner by the denial and deprivation of his rights under the federal constitution may be a matter of surmise and speculation, but it was admitted that "petitioner had several grounds of appeal, including his right of self defense, each of which would have required the reversal of his conviction" (R.17). As we have heretofore shown, there were at least numerous substantial grounds of appeal which counsel on a proper record, proper briefs and argument, could have pressed before an appellate court theretofore uninformed as to the events which had occurred at petitioner's trial and the rulings of the trial court. The petition for habeas corpus, therefore, amply established prejudice and injury, if such demonstration was necessary. As we have indicated, however, neither the California courts nor the federal courts require such showing when fundamental and absolute federal rights are denied.

From all of the foregoing it appears that the petition for habeas corpus alleged facts which plainly revealed substantial denials of petitioner's rights under the federal Constitution; that petitioner pursued the proper remedy in the state courts for redress of such violations; that by its dismissal of the petition for habeas corpus without a hearing, the court below necessarily rejected petitioner's federal claims, and that such ruling, contrary to applicable decision, is reviewable by this Court. Williams v. Kaiser,

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323 U.S.471,477-8; Herman v. Claudy, 350 U.S.116.

II

The Arbitrary And Discriminatory Punishment Of Petitioner By The State Because Of Petitioner's Race And Physical Condition And The Contrivance By The State To Bring About The Prosecution Of Petitioner For Alleged Criminal Offenses In Order To Punish Him for Protests Against The Said Discriminatory Practices Deprived Petitioner Of His Liberty Without Due Process Of Law and Denied Petitioner The Equal Protection Of The Laws In Violation Of The Applicable Provisions Of The Fourteenth Amendment.

In California, it is unlawful "to use in the prisons, any cruel, corporal or unusual punishment or to inflict any treatment or allow any lack of care whatever which would injure or impair the health of the prisoner, inmate or person confined." Cal. Penal Code, Section 2652. "Every person who is guilty of wilful inhumanity or oppression toward any prisoner in a State prison and under his care or his custody" is punishable under the law. Cal. Penal Code, Section 2652. It is also unlawful for any "police officer, warden or keeper of a jail to delegate to any prisoner or group of prisoners authority to exercise the right of punishment over any other prisoner or group of prisoners" in any jail or other place of detention. Cal. Penal Code, Section 4019.5(c).14/ California also recognizes that discriminatory practices because of race "are, moreover, contrary

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14/ The statutes were more honored in the breach than in the observance during petitioner's incarceration, and violations by prison officials reached scandalous proportions. O'Brien v. Olson, 42 C.A.2d 449, 458, 109 P.2d 3.

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to the public policy of the United States and this state." James v. Marinship Corp., 25 C.2d 721, 155 P.2d 329.

It is settled that the prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, "violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." Chicago, Burlington, etc. R'y. v. Chicago., 166 U.S.226, 233. Subsumed within the equal protection and due process clauses of the Fourteenth Amendment are at least the following rights: that no person shall be deprived of his personal security except in accord with due process of law; that no person shall be tried or punished in a manner different than others accused of crime are tried or punished; that persons are entitled to protection from injury from the officers having them in charge; that persons are entitled as prisoners in custody of state officials to protection from injuries sought to be inflicted by third persons; that persons are entitled to be free of the coercive and corrupt action of state officers who seek to contrive unfounded prosecutions against such persons or to inflict arbitrary punishments or penalties upon them. Culpable official inaction, as well as action, may constitute a denial of the equal protection of the laws and a deprivation of liberty without due process of law. Screws v. United States, 325 U.S.91; Moore v. Dempsey, 261 U.S.86, Hernandez v. Texas, 347 U.S.475; Brown v. Board of Education, 347 U.S.483; Lolling v. Sharpe, 347 U.S.497; McFarland v. American Sugar Refining Co. 241 U.S.79; Yick Wo v. Hopkins, 118 U.S.356; Hooper v. Holoman, 294 U.S.103; Chambers v. Florida, 309 U.S.227; Brown v. Mississippi, 297 U.S.278; Norris v. United States, 257 U.S.435.

It is admitted here that prison officials of the state

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subjected petitioner to racial segregation and other forms of racial discrimination; that as part of such discrimination petitioner was subjected to special punishments and discriminatorily denied privileges which others enjoyed, and that his resentment to such treatment caused him to be hated and feared by the officials. It is conceded that because of such official hostility, "prison authorities incited guards and fellow prisoners against petitioner and refused to give petitioner any protection against attacks by guards or fellow prisoners" (R.19). It is not denied that it was the "policy, play or design" (R.20 of the officials to subject petitioner to physical assaults, and it is not denied that shortly before the events occurred which led to his conviction, petitioner was "stabbed nine times by a fellow inmate while a guard looked on without giving aid to petitioner's defense" (R.20). It is also admitted that "it became generally known and understood within the prison that attacks on petitioner were approved and encouraged by prison authorities" (R.20). Nor is it denied in the light of the foregoing that "reasonably believing that his life was in danger, petitioner picked up a knife in order to defend himself," as a result of which his attacker was injured. It is admitted that the subsequent prosecution of petitioner for "possession" of a deadly weapon (but no prosecution of his attacker who also possessed a deadly weapon), was the result of "intentional and arbitrary discrimination against petitioner as an individual and as a member of a class of those Negroes who protested against prison discrimination and segregation" (R.22); and that the purpose of the prosecution was to punish petitioner, and others similarly situated, for their protests against racial discrimination.

If, as must be assumed, proof of all the aforesaid allegations contained in the petition can be made, it is difficult to understand how, consistent with the requirements of the Constitution and the applicable decisions of this Court, the state court below

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refused to grant petitioner a hearing. As we have demonstrated, California law and public policy forbid such fundamental invasions of federal constitutional rights and habeas corpus is the sole and proper remedy. When it is considered that, coupled with the charges of unlawful discrimination against petitioner, there were included allegations of deliberate connivance and incitement by state officials of the attack upon petitioner from which his prosecution arose, and the deliberate instigation of the prosecution by officials of the state in order to punish petitioner for his protests, it is plain that petitioner was at least entitled to a hearing and opportunity to prove his allegations. An "incorrigible" person or even a "guilty" person is nevertheless a "person," entitled to the protection of the federal Constitution from the abuse and misuse of state power. Screws v. United States, 325 U.S.91; Williams v. United States, 341 U.S.97; Mooney v. Holohan, 294 U.S.103. "The first duty of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it." Butts v. United States, 273 Fed.35, 38 (C.A.8, 1921).

III

The Denial By The State Of Petitioner's Request In The Criminal Proceedings For The Opportunity To Obtain The Assistance Of Counsel Of His Own Choice And To Summon Witnesses In His Own Behalf Deprived Petitioner Of His Liberty Without Due Process Of Law And Denied Petitioner The Equal Protection Of The Laws In Violation Of The Applicable Provisions Of The Fourteenth Amendment.

As we demonstrated in the Statement of the Case, any criminal

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prosecution in California by way of information must be preceded by a preliminary hearing. The magistrate "must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings." Cal.Penal Code, section 858. The accused must be allowed "a reasonable time to send for counsel." Cal. Penal Code, section 859. Failure to comply with these provisions renders the preliminary proceedings, and the judgment of conviction based thereon, illegal and unconstitutional, and habeas corpus may be utilized to seek relief.

The record is perfectly plain that petitioner requested an opportunity to obtain the assistance of counsel of his own choice and to summon witnesses in his own behalf. All of his requests were peremptorily denied, although the judicial officer was fully aware that petitioner was under more serious restrictions in obtaining counsel than the ordinary accused.15/ Petitioner was thus deprived of a fundamental right afforded every other person in the state accused of crime.

For over two decades, it has been the established view of this Court that the Fourteenth Amendment to the Constitution of the United States guarantees the right of the accused in criminal prosecutions in state courts to the assistance of counsel for his defense. "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." Powell v. Alabama, 287 U.S. 45, 69. Questions concerning the right to appointment of counsel in non-capital cases, often mooted thereafter in this Court, are not

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15/ The magistrate was informed that petitioner was confined to Folsom prison, that "he is down here on a Court order just for the purpose of this hearing" (App.F). Petitioner advised the court that he had been in no position to obtain an attorney prior to the hearing (R.8).

involved in this proceeding. "But that doctrine has no application here. Petitioner did not ask the trial judge to furnish him counsel; rather, he asked for a continuance so that he could obtain his own. The distinction is well established in this Court's decisions." Chandler v. Fretag, 348 U.S.3,9.

This Court has also stated that the constitutional right to assistance of counsel is not limited to counsel at the trial. Otherwise, this fundamental right could be whittled away by denying the assistance of counsel at crucial stages of the proceedings both before trial and after conviction, as was done in the instance case. "He requires the guiding hand of counsel at every step in the proceedings against him." Powell v. Alabama, 287 U.S.45,69. See also, Johnson v. Zerbst, 304 U.S.458,463; Hawk v. Olson, 326 U.S. 271,278; Von Moltke v. Gillies, 332 U.S.708,722.

Undoubtedly, one of the most crucial stages of any criminal proceeding is the preliminary hearing. In the first place, the inquiry at this stage is essentially judicial. The subject matter is restraint of the accused person's liberty. Evidence is adduced for the prosecution in many instances, as was the case here. The magistrate sits, not as a prosecutor, but as a judge. In short the hearing is judicial, and must be so in essential procedure. Wood v. United States, 128 F.2d 265, 270 (C.A.D.C.,1942).

Moreover, an accused is no less an accused at the preliminary hearing than at any other stage of the proceedings, and no less in need at that stage than at any other of the assistance of counsel. Evans v. Rives, 126 F.2d 633, 641 (C.A.D.C.,1942). "If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, ... If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." Powell v. Alabama, supra, p.69.

"We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment." Hawk v. Olson, supra, p.278.

In addition, it is not only the assistance of counsel, but the effective assistance of counsel to which an accused is entitled. Reece v. Georgia, 350 U.S.85. The preliminary hearing is an important stage, among other things, in the preparation of the defense. Here counsel learns for the first time the nature of the charge against the accused; for the first time, he not only hears the character of the evidence against his client but he has an opportunity to observe the prosecution witnesses, their demeanor on the stand, the extent to which they may be deemed credible witnesses. Counsel has the opportunity to cross-examine and to fix the testimony of hostile and biased witnesses. In effect, the preparation of the defense, the search for witnesses, begins importantly at this stage of the proceedings. For these reasons, not only the courts but eminent authorities have stressed the importance of counsel at the preliminary stages of a criminal proceeding. "In general, the right to counsel has been given a broad interpretation, not only in the Scottsboro Cases, but in the state decisions. It has been held to confer every privilege which will make the presence and aid of counsel a valuable right. It has been said to contemplate not only the right to counsel at the trial, but also at every stage of the proceedings. After ample notice of the charge against him, of its consequences, and of his rights, the defendant should be allowed reasonable time to procure counsel who should be allowed every reasonable opportunity for full and confidential consultation with the defendant, and reasonable time for preparation of the defense." Orfield, Criminal Procedure From Arrest To Appeal (1947), p.420.

"... the time when an accused person really needs the help of a lawyer is when he is first arrested and from then on until trial. The intervening period is so full of hazards for the accused person that

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he may have lost any legitimate defense, long before he is arraigned and put on trial." Miller, J., Lawyers and the Administration of Criminal Justice, 20 Am. B.A.J.77,78.

Conclusion

For all of the reasons above set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted, the order and judgment of the court below reversed, and the case remanded with directions that petitioner be afforded the opportunity to prove the allegations contained in his petition for a writ of habeas corpus.

Respectfully submitted,

CHARLES H. GARRY,

ALBERT GROSSMAN,

Attorneys for Petitioner

LEO BRANTON, JR.

Of Counsel

APPENDIX A

ORDER DENYING WRIT OF DALLAS COUNTY

Crim. No. 5034

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In re Wells

on Habeas Corpus

Petition for writ of habeas corpus DENIED.

CARTER, J., is of the opinion that the respondent should be ordered to show cause why the relief prayed for should not be granted.

Dated: _____

_____
GIBSON
Chief Justice

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 27th day of March A.D.1958

(SEAL) WILLIAM I. SULLIVAN, Clerk

By /s/ Di Noia
Deputy Clerk

F I L E D
JAN 25 1958
WILLIAM I. SULLIVAN, Clerk

By Paul DiNoia
S.F.Deputy

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APPENDIX B

OPINION OF THE DISTRICT COURT OF APPEALS, 68 C.A.2d 479, P.2d 979

[Crim. No.1891. Third Dist. Mar.19,1945]

THE PEOPLE, Respondent, v. WESLEY ROBERT WELLS, Appellant.

* * *

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. Malcolm C. Glenn, Judge. Affirmed.

Prosecution for unlawful possession of deadly weapon by a prisoner. Judgment of conviction affirmed.

Wesley Robert Wells, in pro.per., for Appellant.

Robert W. Kenny, Attorney General, and Ward Sullivan, Deputy Attorney General, for Respondent.

THOMPSON, J. --The defendant has appealed from a judgment rendered pursuant to the verdict of a jury, convicting him of the crime of unlawful possession of, and carrying on his person, a sharp instrument to wit, a knife, while he was a prisoner in Folsom State Prison, contrary to the provisions of section 4502 of the Penal Code. He also gave written notice of an appeal from "the court's order denying a motion for a new trial." No motion for a new trial was presented to the trial court, and we shall therefore disregard that portion of the notice of appeal.

The defendant was represented at the trial by an attorney. During the trial the attorney withdrew as counsel, at the defendant's request. The defendant elected to and did represent himself in the completion of the trial, except that the attorney was permitted to argue the case to the jury. The defendant appears in proper person on this appeal.

It is contended, in effect, that section 4502 of the Penal Code is unconstitutional; that the verdict and judgment are not

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supported by the evidence; that the court erred in "ruling out his defense of self-defense," and that, since the statute does not prescribe a maximum penalty for the crime the judgment is uncertain and void. It is also claimed that the court erred in failing to require the clerk to include in his transcript on appeal the instructions to the jury which were given and refused.

The defendant admitted at the trial that he was a prisoner in Folsom State Prison at the time charged in the information, and that he was then in possession of a knife with which he stabbed a fellow prisoner by the name of William H. Brown. The defendant claimed to have armed himself and to have used a knife in necessary self-defense. The transcript contains over two hundred pages of testimony, most of which relates directly to defendant's possession and use of the knife in alleged necessary self-defense, which evidence was adduced over the objection of the prosecution officer. That evidence was not stricken from the record. The defendant was permitted to fully develop that defense. Numerous inmates of the prison and several officers were fully examined upon that issue as witnesses. The defendant took the stand in his own behalf. There is a conflict of evidence regarding the affray which occurred in the mess hall. The defendant claimed that he had a controversy in the mess hall with Brown who had threatened to inflict upon him bodily harm. He testified that at the time of the cutting affray Brown was also armed with a knife. That was apparently true. The defendant stated that he procured the knife in question from another prisoner and put it inside of the case in which he was carrying a musical instrument. He was a member of the prison orchestra. At the same time he also took another prisoner's jacket from a hook in the hallway, and placed it on the bench upon which he subsequently sat at the mess table. When he observed Brown enter the mess hall the defendant removed the knife from the musical instrument case and slipped it into a music book which he carried. He then placed the jacket over the book. It

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appears that the controversy was renewed, and as Brown approached the defendant he arose and, picking up the jacket which he used as a shield, he seized the knife and cut Brown repeatedly in the abdomen and chest, inflicting serious injuries. He drove Brown from the mess hall into the kitchen. The prison guards interfered in the affray and demanded that the defendant surrender possession of the knife, which he then refused to do. He was taken some distance to the office of the Captain of the Guard, to whom he delivered the knife. The circumstances of the case leave a reasonable question as to which party was the aggressor in the affray.

If self-defense is a proper defense to the crime charged under section 4502 of the Penal Code, under the circumstances of this case, which we do not decide, we must assume the implied findings of the jury determined that the defendant did not procure the knife and retain possession of it, in necessary self-defense, believing as a reasonable man that it was necessary to do so to protect himself against imminent danger of great bodily harm at the hands of his fellow prisoner. That issue was decided against him. There is sufficient evidence to support the verdict and judgment of conviction in that regard.

The appellant is mistaken in asserting that his evidence of self-defense was stricken from the record. We have carefully examined the transcript and find there was neither a motion nor an order to strike that evidence from the record. That evidence was adduced over the objection of the district attorney, but the case was tried and argued to the jury on the theory that it was competent. Some objections to certain questions were sustained. Our attention is not called to any specific assignments of error in that regard. We observe no error in such rulings. The rulings of the court appear to have been proper.

The instructions were properly excluded from the clerk's transcript on appeal. The appellant failed to request the inclusion

of the instructions in the transcript. (Rules on Appeal, rule 33.) Subdivision (b) of the previously cited section of rules contemplates that instructions shall not be included in the transcript unless they are specifically requested. In his brief on appeal the appellant designates no instruction given or refused which he contends constituted error. There is no merit in the assertion that the appellant was prejudiced by failure to include the instructions in the clerk's transcript.

Section 4502 of the Penal Code, prohibiting prisoners in any state prison from having possession of or bearing on their persons certain designated weapons, is not unconstitutional or in conflict with article 1, section 1, of the state Constitution, which guarantees all men the right to acquire and possess property. Neither does that section of the code violate the provisions of the Second Amendment of the federal Constitution which prohibits infringement of the right of the people to keep and bear arms. It has been frequently held that similar statutes are valid enforcements of reasonable police regulations (In re Mercia, 193 Cal. 33, 36 [220 P. 914, 34 A.L.R. 917]; People v. Belcastro, 76 Cal.App. 287 [244 P. 929]; People v. Possolo, 44 Cal.App. 220 [187 P. 147]; ... Const. (2d ed. 1933), p. ...; 2 Nel. 's Constitution and Courts, p. 390; Bishop on Statutory Crimes (3d ed.), Section 794, p. 535.) Section 4502 of the Penal Code is a reasonable, uniform police regulation designed to protect keepers and officers of state prisons from the peril of assaults with dangerous weapons perpetrated by armed prisoners. That statute was adopted on the justifiable theory that even in prison there are persons of reckless dispositions becoming incorrigible and resorting to violence if they are permitted to carry upon their persons deadly weapons. The possession of such weapons by prisoners is therefore validly and wisely prohibited.

It was not necessary for the prosecution to prove affirmatively that the defendant armed himself with the intention of unlawfully

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carrying upon his person the prohibited weapon for the purpose of violating the statute. That section of the code absolutely prohibits all prisoners in any state prison, without qualification, from possessing or carrying on their persons certain designated deadly weapons. The intention with which the weapon is carried on the person is not made an element of the offense. Proof of the possession of the prohibited weapon infers that it is carried in violation of the statute. (People v. Gonzales, supra; People v. Wolfrom, 15 Cal.App.732,736 [115 P.1047]; 1 R.C.L. 578, Section 309.) Certainly, the defendant, under such circumstances, has the burden of proving as a matter of defense, that he is not carrying the weapon in violation of the statute. In some jurisdictions statutes which prohibit the carrying of concealed weapons contain specified exceptions, such as the transportation of a weapon as a mere article of merchandise, or for the purpose of taking it to a shop for repairs. (Foster v. State, 59 Tex. Crim. Rep. [126 S.W.1155, Ann.Cas.1912A 1207.) Under such statutes, and apparently in some cases in which such exceptions were not provided for, it is held that courts should take into consideration the intent or purpose with which the accused carries the weapon. But California courts are in accord with those jurisdictions which hold that where the intent is not made a necessary element of the crime it is not essential to prove affirmatively the purpose for which the act is performed. Section 4502 of the Penal Code is unqualified in its prohibition against prisoners of a state prison having in their possession or on their persons the weapons enumerated therein. We are convinced that the intent or purpose with which a prisoner arms himself with a prohibited weapon is not a necessary element under that statute. In 9 Ruling Case Law at page 283 it is said:

"In other jurisdictions the courts hold that the intent of one accused of carrying a concealed weapon is immaterial, and that if he has a weapon concealed on his person contrary to statute he is

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guilty of the crime denounced thereby regardless of the purpose for which he carried the weapon. In support of this rule it has been held that the guilty intent is the intent to carry the weapon concealed, and does not depend upon the intent to use it, and that the object of the statute is not to forbid the carrying of a deadly weapon for use, but to prevent the opportunity and temptation to use it arising from its concealment." (Italics added.)

It is not necessary for us to determine whether the mere possession of a prohibited weapon by a prisoner in a state prison, which is secured for the sole purpose of protecting himself against a threatened imminent assault by another inmate, would constitute a valid proper defense to the charge of violation the provisions of section 4502 of the Penal Code. The defendant claimed that was the only reason he armed himself with the knife. Over the objection of the prosecuting officer the defendant was permitted to fully develop that alleged defense by the introduction of much evidence on that subject. The case was also argued to the jury on that theory. The jury found the defendant guilty as charged. In support of the verdict and judgment we must assume the jury did not believe that the defendant procured, carried or used the knife in necessary self-defense to protect himself against threatened imminent danger of great bodily harm at the hands of a fellow prisoner. The defendant had the full benefit of that theory of necessary self-defense, even though it be conceded that evidence was competent, which we refrain from determining.

The purpose for which the knife was secured, carried and used by the defendant, together with the question as to who was the aggressor in the affray, were problems for the determination of the jury, with which we may not interfere on appeal, except when there is an absence of evidence to support the implied findings in that regard. At most, the evidence of the affray and as to who was the aggressor is competent upon this charge only to the extent that it

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may tend to indicate whether the defendant was unlawfully in possession of the knife in violation of the provisions of section 4502, supra. There are many circumstances in this case which would warrant the jury in deciding that the defendant was the aggressor in the affray and that he deliberately armed himself with the intention of provoking the affray with Brown. There is ample evidence to support the verdict of the jury and the judgment of conviction of the defendant's unlawful possession of a deadly weapon.

The fact that section 4502 supra, does not prescribe a maximum penalty does not render it indefinite, uncertain or void. That section provides that one who has been convicted of that offense shall be punishable by imprisonment in the state prison "for a term not less than five (5) years." The defendant in this case was sentenced to imprisonment for the term prescribed by law "to run concurrently with the unexpired term of imprisonment of the sentence rendered on February 2[illegible], 1942." The term of the sentence in this case was properly undetermined by the trial judge in accordance with the provisions of section 1168 of the Penal Code, providing for an indeterminate sentence. Since section 4502 of the Penal Code provides only for the minimum term of imprisonment, the maximum penalty is presumed to be for life. (People v. Walsh, 24 Cal.2d 575,578 [150 P.2d 401]; People v. McCabe, 2 Cal.2d 441, 450 [43 P.2d 334]; In re Lee, 177 Cal.690 [171 P.959]; People v. Meyers, 31 Cal.App.2d 515 [88 P. 2d 213]; People v. Siegel, 55 Cal.App.2d 879 [130 P.2d 763].)

The case of People v. Chan, 189 Cal.153 [207 P.994], upon which the appellant relies in support of his alleged uncertainty of the maximum penalty prescribed has no application to this appeal. In that case the defendant was convicted of an attempt to commit robbery. He was sentenced for the term "prescribed by law." The maximum term of imprisonment was properly deemed to be for defendant's lifetime. Section 664, paragraph 1, of the Penal Code prescribes the penalty for attempted crimes, when the penalty is not otherwise designated

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to be "not exceeding one-half the longest term of imprisonment prescribed." Quoting with approval from the case of People v. Burns, 138 Cal.159 [29 P.16, 70 P.1087, 60 L.R.A.297], the court said:

"'What the actual life of a particular person would be, and what would be the half of it, cannot be known; and if one-half of the life of the appellant were the only punishment prescribed for the crime of which he was convicted, such punishment would be too vague and indefinite to be possible of enforcement, and no judgment could be rendered against him.'"

The court therefore properly held in the same case that the penalty of one-half of the life of the defendant, which was the maximum penalty then provided for attempt to commit robbery, was invalid for uncertainty. That case was decided in June, 1922. The following year the Legislature amended section 664 of the Penal Code definitely fixing the penalty for the crime of attempted robbery at "not more than twenty years." (Stats.1923, p.[illegible].) No uncertainty regarding the maximum penalty, such as existed in the cases case, is involved in this case. The maximum penalty under section 4500, supra, under the authorities previously cited, is for the term of life, which is not uncertain or indefinite.

It was not the duty of the trial judge to definitely fix the term of imprisonment in this case as provided by section 671 of the Penal Code. That section was adopted in 1[illegible]. It is superseded in that respect by the enactment of the indeterminate sentence act (Pen. Code, section 1168), which was subsequently passed in 1917, and repeatedly amended, even as recently as 1941, specifically providing that "the court in imposing the sentence shall not fix the term or duration of the period of imprisonment." (Italics added.) (Peoplev. Hatton, 13[illegible] Cal.App.2d 201, 208 [29 P.2d 49]. In the case last cited, in which a hearing by the Supreme Court was denied, the court said:

"Section 671, supra, does apparently provide that the court

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right have, in this instance, sentenced the defendant for a certain number of years. However, section 1168, supra, without direct reference to section 671, supra, suspends the operation hereof by necessary implication. The very first sentence provides that the trial court shall not fix the term or duration of the period of imprisonment." (Italics added.)

In the present case the trial court properly disregarded the provisions of section 671 in that regard, and conformed to the definite requirements of section 1168, by merely adjudging that the defendant should be committed to state prison for the term provided by law.

For the foregoing reasons the judgment and the order are affirmed.

Adams, P.J., and Peek, J., concurred.

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Excerpt from Clerk's Transcript on Appeal, page 17, People v. White.

Defendant was filed a notice of appeal from order denying motion for new trial, and also from judgment of conviction. There was no order denying new trial, for the reason that no such motion was made.

In the notice of appeal defendant has asked for

1. A typewritten copy of reporter's transcript including

(a) the opening statement of the district attorney;

(b) together with all the evidence taken upon the trial;

(c) and all proceedings had in the case relative to testimony taken before the court at the trial of said action, and in

(d) the instructions and proceedings at the time of pronouncing judgment, and

(e) the clerk's transcript as ordered by the legal rules of this state.

Under the provisions of rule 11 applicable to criminal cases, plaintiff was given a point or points whereon he will rely and intends to rely which make it proper to include the material which defendant desires to have included; likewise he was not included in its request for additional record by instructions given or refused.

It is therefore ordered that only the normal record, as set forth in rule 11 of appeals in criminal cases be prepared without the inclusion of the additional matter requested to be included.

Dated October 9, 19--.

Endorsed: Filed [illegible] Clerk. [illegible]

[illegible] - 19-- Judge of the Superior Court.

[illegible], Clerk, by [illegible], Deputy."

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APPENDIX D

Excerpts from Instructions of the Trial Court

Court

When the intent with which an act was committed is not made an affirmative element of the crime - and the law under which defendant is being prosecuted does not so make it, - the law imputes that the act done knowingly was done with criminal intent.

GIVEN
/s/ Malcolm C. Glenn
JUDGE

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Court Instruction:

The defendant is charged with the unlawful possession of the knife (introduced in evidence) at a point marked 1 on the map, which was at a time subsequent to the testimony as to the physical violence between Wells and Brown at a point marked B or (3 words that follow are illegible). This case is not one where defendant is charged with assault with a weapon. He is charged with willfully, knowingly and unlawfully having possession of a dirk or knife. Defendant stated that he secured the knife or dirk outside of the mess hall, and that he himself placed it on a seat or bench near where the trouble between him and Brown took place.

You are instructed that defendant cannot claim self defense, nor that he was justified in the possession, custody or control thereof, if as stated he himself placed the knife on the bench, and if you find that he grabbed the knife, even though he claims to have done so in self defense. The law does not justify a prisoner in arming himself with a knife or dirk even though he belives he is later to be attacked by another prisoner.

GIVEN
BY /s/ Malcolm C. Glenn
JUDGE

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APPENDIX I

Excerpt from Reporter's Transcript on Appeal, People v. Wells, p. 9-

TESTIMONY OF

WESLEY ROBERT WELLS, witness produced in his own behalf, SWORN

DIRECT EXAMINATION

THE WITNESS: My name is Wesley Robert Wells. I am known in prison by the name of Bob Wells. I am assigned to the Prison Orchestra. I play in the orchestra twice a day. On the morning of August 15th I had occasion to have an argument with an inmate by the name of Brown, -- known as Graveyard Brown, -- which started on the handball court.

MR. SEELY: Just a moment, please. In the testimony of previous witnesses, testimony upon that subject has been stricken as too remote.

THE COURT: It is stricken out.

THE DEFENDANT: If you please, your Honor --

THE COURT: I don't want an argument. You are a witness. When you take the stand, you are a witness, the same as any other witness. You can't make an argument.

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APPENDIX F

Excerpt from Reporter's transcript of Preliminary Examination.

* * * *

MAGISTRATE: Stand up, please. It appearing to me that the offense in the within mentioned complaint has been committed, and that there is probable cause to believe the defendant, Wesley Robert Wells, guilty thereof, I order that he be held to answer to the same, that -- is he in the custody of the Warden at San Quentin?

MR. SULLY: At Folsom, yes, he is. And is down here on a Court order just for the purpose of this hearing.

MAGISTRATE: That he be returned to the custody of the Warden of Folsom Prison.

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